20. DEEDS AND CONVEYANCES SDCL 43-25

43-25-1. Requisites for transfers of certain estates.

An estate in real property, other than an estate at will or for a terms not exceeding one year, can be transferred only be operation of law, or by an instrument in writing, subscribed by the party disposing the same, or by his agent thereunto authorized by writing.

Agent's authority.

Lund v. Thackery, 99 NW 856 (SD 1904). In view of this statute, the deed was invalid when grantor's agent, without written authorization by the grantor, and with the full knowledge of the grantee, filled in the grantee's name and the amount of the consideration.

Hulsether v. Peters, 167 NW 497 (SD 1918). Where a transfer of real property was void under this section because the name of the grantee in the deed was filled in agent not having written authority, not only could grantor take advantage of the deed's infirmity, but also any person whose rights would have been affected by it.

Executed agreements.

Butte County v. Gaver, 49 NW2d 466 (SD 1951). Where grantor orally agreed to convey land containing a gravel pit to the county, and although no deed was ever executed, county paid grantor for land and removed gravel for two years, county acquired an equitable interest in the land and was entitled to a deed notwithstanding grantor's later conveyance to defendant who had knowledge of the county's interest.

Name of Grantee.

Karlen v. Karlen, 235 NW2d 269 (SD 1975). The fact that the name of the grantee was not added to an otherwise signed and acknowledged warranty deed was of no consequence before delivery; even if the blank had been completed moments before delivery, whether by the grantor or his agent or even by the grantee, once the deed was completed and properly delivered it took affect.

Oral agreement of right of way.

Spawn v. South Dakota Cent. Ry. Co., 127 NW 648 (SD 1910). Oral agreement between landowner and railroad, that railroad could build a right of way across owner's land was unenforceable.

43-25-2. Conveyance of interest in property by owner out of possession.

Any person claiming right or title to lands, tenements or hereditaments, although he, she, or they may be out of possession, may sell, convey, or transfer his or her interest in and to the same in as full and complete of manner as if he or she were in actual possession of the lands and premises intended to be conveyed; and the grantee or grantees shall have the same right of action for the recovery thereof, and shall in all

respects derive the same benefit and advantage therefrom as if the grantor or grantors had been in actual possession at the time of executing the conveyance.

43-25-3. Conclusiveness of grant of estate in real property – Exception.

Every grant of an estate in real property is conclusive against the grantor and everyone subsequently claiming under him, except a purchaser or encumbrancer who, in good faith, and for valuable consideration, acquires a title or lien by an instrument that is first duly recorded.

43-24-5. Warranty deed – Standard form.

The standard form of warranty deeds in this state are as follows:

_____, Grantor, of _____, for and in consideration of _____ dollars, *grants, conveys, and warrants*, to _____ grantee, of _____ P.O. the following described real estate in the county of _____ in the State of South Dakota:
_____
_____.

Dated this _____ day of _____, 20___.

(Signature)_____

(Acknowledgement)

43-25-6. Implied covenants and warranties in deed.

Every such instrument duly executed as required by law shall be a conveyance in fee simple of the premises described to the grantee, his heirs and assigns, with covenants on the part of the grantor, his heirs and personal representatives,

(1) That he is lawfully seized of the premises in fee simple, and has good right to convey the same;
(2) That the premises are free from all encumbrances;
(3) That he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession thereof; and
(4) That he will defend the title thereto against all persons who may lawfully claim the same.

Such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at length in such a deed.

Damages for breach of covenant.

Holzworth v. Roth, 101 NW2d 393 (SD 1960). Breach of any covenants contained in this section is in effect a breach of contract for which action for damages will lie, and a suit in equity by the grantee against the grantor who sold the property encumbered by mechanics liens should have been dismissed had adequate remedy at law.

43-25-7. Quitclaim deed – Standard form.

The standard form of quitclaim deeds in this state is as follows:

_____, Grantor, of _____ county, state of _____, for and in consideration of _____ dollars, *conveys and quitclaims* to _____, the grantee, of _____ P.O. all interest in the following described real estate in the county of _____ in the State of South Dakota

_____

_____

_____

Dated this _____ day of _____, 20___.

(Signature)_____

(Acknowledgment)

43-25-8. Right, title, and interest conveyed by quitclaim deed – After acquired title.

Every such instrument, duly executed, shall be a conveyance to the grantee, his heirs and assigns, of all right, title, and interest of the grantor in the premises described, but shall not extend to after-acquired title, unless words expressing such intention be added.

Action pending at time of quitclaim.

Teegardin v. Noillim Enter., Inc., 385 NW2d 106 (SD 1986). As provided by this section, a quitclaim deed by which a husband transferred his interest in home to his ex-wife purported to do no more than transfer the husband's interest in the property, and not his right to recover money by a judicial proceeding. Therefore, the husband was improperly dismissed from an action filed before he executed the quitclaim deed, which action sought reimbursement and damages for faulty and incomplete construction of the home.

After-acquired title.

Bechard v. Union County, 27 NW2d 591 (SD 1947). Quitclaim deed from nephew to uncle, conveying nephew's interest in real property held by uncle as life tenant, and containing provision that grantor also quitclaims "all right, title, or interest that he may acquire in the future," to such property, conveyed to uncle all interest in property which nephew would have later acquired as uncle's heir.

Grantee charged with notice.

Parker v. Randolph, 59 NW 722 (SD 1894). The grantee under a quitclaim deed is not a bona fide purchaser.

Lusk v. City of Yankton, 168 NW 375 (SD 1918). Party claiming under chain of title containing quitclaim deed is charged with notice of all outstanding adverse equities in the property.

Quitclaim by mortgagee.

State v. Mellette, 92 NW 395 (SD 1902). Where mortgagee, assigned mortgage by endorsing mortgagor's promissory note and executing quitclaim deed, assignee, who knew conveyance was in fact a mortgage, took only the lien to the property.

43-25-9. Other forms of deeds unaffected by standard forms of warranty and quitclaim deeds.

The provisions of SDCL 43-25-5 to 43-25-8, inclusive, so not preclude the use, affect the validity, or control the interpretation of other forms of warranty and quitclaim deeds.

43-25-10. Use of word "grant" in conveyance – Implied covenants, action to enforce.

Form the use of the word "grant" in any conveyance by which an estate of inheritance or in fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself or his heirs to the grantee, his heirs and assigns, are implied unless restrained by express terms contained in such a conveyance:

(1) That previous to the time of such execution of such conveyance, that grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee; and
(2) That such estate is, at the time of execution of such conveyance, free from encumbrances done, made, or suffered by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had expressly inserted in the conveyance.

"Grant" unnecessary.

Evenson v. Webster, 53 NW 747 (SD 1892). While the statute use the word "grant" in describing the conveyance of property, such word is not indispensable, and any words that manifest the same intent will suffice.

43-25-11. Use of words "remise," "release," or "quitclaim," in conveyance – Implied covenants.

From the use of the words "remise," "release," or "quitclaim" in any conveyance by which an estate in or interest in real property is to be passed, the following covenants on the part of the grantor to the grantee, his heirs or assigns, are implied, unless restricted by express terms contained in such conveyance:

(1) That previous to the time of execution of such conveyance the grantor has not yet conveyed the same estate or any right, title, or interest therein to any person other than the grantee; and
(2) That such estate is at the time of the execution of such conveyance free from encumbrances made, done, or suffered by the grantor.

43-25-12. Prior unrecorded conveyance – Rights of purchaser in good faith.

Any person in holding real estate or any interest therein under a conveyance in the terms of SDCL 43-25-11 shall be deemed a purchaser in good faith and for valuable consideration, unless such person at the time of the execution and delivery of such conveyance shall have actual notice or knowledge of a prior unrecorded conveyance affecting title to such real property.

43-25-14. Heirs and devisees answerable for covenant or agreement with reference to land received by decedent or devise.

The heirs and devisees of any person who has made any covenant or agreement in reference to the title of, in, or to any real property, are answerable upon such covenant or agreement to the extent the land descended or devised to them, in the cases and in the manner described by law.

Necessity of claim against estate.

Sueur v. Quillian, 228 NW 380 (SD 1929). Insufficient assets in the grantor's estate to pay off the encumbrances of the property conveyed to the grantee, did not excuse the grantee's failure to file a claim against the estate before bringing an action under this statute against heirs and devisees.

No legal claim.

McFarland v. McFarland, 470 NW2d 849 (SD 1991). In an action by son and his wife against mother's estate alleging breach of covenant warranty deed between father as grantor and son as grantee, since both parties agreed that no interest in the property reached the mother's estate, this section requires an interpretation that son and his wife do not have a legal claim against her estate.

Unrecorded option to purchase.

Speck v. Anderson, 318 NW2d 339 (SD 1982). Devisee took property under a will subject to an option to purchase where the option was unrecorded at the time of the final decree of distribution was entered.

43-25-15. Presumption of fee simple title – Exception.

A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended.

Intention of parties not ascertainable in deed.

Northwest Realty Co. v. Jacobs, 273 NW2d 141 (SD 1978). Where there are conflicting clauses in a deed so that construction o f the deed as a whole leaves the intention of the parties in doubt as to whether a fee or easement was intended to be conveyed the following rules of construction are considered to determine such intention:

(1) The particularity of the description of the property conveyed;
(2) The extent of the limitation upon the use of the property;

(3) The type of interest that best serves the manifested purpose of the parties;
(4) The peculiarities of the wording used in the conveyance document;
(5) To whom the property was assessed and who paid the taxes on the property;
(6) And how the parties to the conveyance, or their heirs and assigns, have treated the property.

Intent of parties to transfer fee.

Meyerink v. Northwestern Pub. Serv. Co., 391 NW2d 180 (SD 1986). When the term "right-of-way" is used in a deed, it usually indicates that only an easement is being conveyed; however, if the instrument, considered as a whole, indicates that fee title was intended by the parties, then the presumption of fee title controls.

Although the deed between the railroad and landowner's predecessors in interest was captioned a "right-of-way deed", the transfer of fee title, and not a lesser estate, was intended, where the deed stated that the landowners "will forever Warrant and Defend title to the premises hereby conveyed…"

Limitation of use.

Sherman v. Sherman, 122 NW 439 (SD 1909). A deed granting land to a railroad which contained a provision to which grantee deemed land necessary "for the use of its railroad, but for no other purpose," and that land was conveyed "for the purpose aforesaid, but no other," did not reserve in grantors any use of or dominion over land, nor any right to reenter or resume possession if land was not used for railway purposes.

43-25-16. Condition precedent in grant of real property – Performance necessary to pass estate.

An instrument purporting to be a grant of real property, to take effect upon a condition precedent, passes the estate upon the performance of the condition.

Grant to Corporation.

Stacey Taylor Trippet Special Trust v. Blevins, 545 NW2d 216 (SD 1996). Where an acquisition and development agreement provided that the landowner would convey two-thirds of his interest in the real property to a corporation which was formed by the agreement upon satisfaction of certain conditions precedent, there was no conveyance since the conditions precedent did not occur and, therefore, no title to the land was granted to corporate shareholders who had a contractual right to receive 66.67 percent of the corporate stock; even if the conditions precedent had been met, the corporation would have owned the land, and not the corporate shareholders.

43-25-17. Subsequently acquired title passes by operation of law.

Where a person purports to by proper instrument to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee and his successors.

Applicability of quitclaim deed and wife who joins in quitclaim deed.

State v. Kremmerer, 84 NW 771 (SD 1900). A quitclaim deed did not come within provision of this section, as it did not purport to convey property in fee simple. Wife, not being the owner of the property, but joining husband in quitclaim deed in the mere capacity of grantor's wife, was wholly exempt from the operation of this section when she subsequently acquired the same property in her own right.

Common law modified.

Tilton v. Flormann, 117 NW 377 (SD 1908). This section modifies the common law rule regarding after-acquired title in that it (1) omits the common law qualification that a deed purporting to convey title must be full warranty deed, and (2) provides that title passes by operation of law instead of by way of estoppel.

Subsequent government patent.

Bernardy v. Colonial & U.S. Mortgage Co., 98 NW 166 (SD 1904). Where grantor held only timber culture entry on government land when he conveyed land to grantee in fee simple, but was later issued patent to land by government, grantee took grantor's after-acquired title by operation of law.

Subsequent heirship.

Avon State Bank v. Commercial Sav. Bank, 207 NW 654 (SD 1926). Where son gave mortgage on land to his father, and soon thereafter father died, entitling son to 1/27th of father's estate, son, at date of mortgage, did not transfer interest in land which he subsequently acquired as heir.

Subsequent tax title.

Zerfing v. Seeling, 80 NW 140 (SD 1899). Where grantor conveyed land subject to tax lien which he was to satisfy, and failed to satisfy lien so that it ripened into a tax deed which grantor himself took, title acquired thereby passed to grantee under this statute.

43-25-18. Grant made on condition subsequent defeated by nonperformance of condition.

Where a grant is made upon a condition subsequent, and is subsequently defeated by nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant duly acknowledged for record.

43-25-19. Encumbrances defined.

The term "encumbrances" includes taxes, assessments, and all liens upon real property.

43-25-26. Recording of grant of estate in real property – Acknowledgement or proof by subscribing witness required.

The execution of a grant of an estate in real property, other than an estate at will or for a term not exceeding one year, if it is not duly acknowledged, must, to entitle the grant to be recorded, be proved by a subscribing witness, or as otherwise provided in SDCL 43-28-8 and 43-28-10.

43-25-27. Unrecorded instrument showing title to real property – Ownership – Passing with Title.

Instruments essential to the title of real property and which are not kept within a public office as a record pursuant to law, belong to the person in whom, for the time being, such title may be vested, and pass with the title.

43-25-29. Title passed by transfer of land bounded by highway.

A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway in front, to the center thereof, unless a different intent appears from the grant.

Conveyance "along" road.

Sweatman v. Bathrick, 95 NW 422 (SD 1903). Although deed described property in deed in terms of ground "running northerly long Sherman Street," it was presumed that grantors intended to convey land to the center of the street.

Easement for highway purposes only and express reservation required.

Olson v. United States Fid. & Guar. Co., 549 NW2d 199 (SD 1996). The conveyance of a lot to the State created an easement for highway purposes only, and not a fee simple title. The conveyance of property fronting on a street or highway is presumed to carry title to the center of the street or highway, unless the fee in the street is expressly reserved in the conveyance.

Pluimer v. City of Belle Fourche, 549 NW2d 202 (SD 1996). The conveyance of a lot to the state created an easement for highway purposes only, and not a fee simple title. The conveyance of property fronting a street or highway is presumed to carry title to the center of the street or highway, unless the fee in the street is expressly reserved in the conveyance.

43-25-30. Easements passed by transfer of real property to which they are attached.

A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

Deed not mentioning easement.

Nelson v. Gregory, 323 NW2d 139 (SD 1982). The transfer of real property by deed from grantor to grantee passed all easements attached to the property

even though the deed of conveyance did not specifically mention the grant of the easement.

Full House, Inc. v. Stell, 2002 SD 14. Once the parameters of an easement are established, it runs with the land, passing to whomever buys the property for the benefit of the easement holder. Thus, where property was subject to an easement for a hotel sign to run in perpetuity and that property was subsequently acquired by another company through foreclosure, the easement remained appurtenant to the property although not mentioned in he deed.

Easement created by owner - Prescription.

Homes Development Co. v. Simmons, 70 NW2d 527 (SD 1955). While an owner cannot create am easement on his own land, upon severance by sale of part of such land, easements can be created according to benefits or burdens existing at the time of the sale.

Defendant landowners were entitled to the benefit of an easement in the from of an irrigation ditch over the plaintiff's property, which their predecessors had enjoyed for over fifty years, even though most conveyances in defendants' chains of title contained no reference to any such ditch or water right.

Wiege v. Knock, 293 NW2d 146 (SD 1980). Where during unity of title, and apparently permanent and obvious servitude is imposed on one part of the estate in favor of another part, which servitude, at the time of severance, is in use and is reasonably necessary for the fair enjoyment of the other part of the estate, then upon a severance of the ownership, a grant of the right to continue to such use arises by implication of law.

Peterson v. Beck, 537 NW2d 375 (SD 1995). Because South Dakota law and precedents recognize easements, where original owner had used parking lot of his golf course patrons prior to sale to first purchasers of adjacent land, and golf course patrons continued to ise parking lot after sale and such use was open and obvious and beneficial to both landowners and was not abandoned by the building of a new clubhouse, second purchasers of adjacent land and parking lot had notice of the easement and acquired the property subject to the easement.

43-25-31. Conveyances by owner for life or for years.

A grant, made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer.

43-25-32. Reservation to revoke or modify instrument affecting estate in real property – Subsequent grant revokes original instrument.

Where a power to revoke or modify an instrument affecting the title to, or the enjoyment of an estate in real property, is reserved to the grantor, or given to any other person, a subsequent grant of or a change upon the estate, by the person

having the power of revocation, in favor of a purchaser or encumbrancer, for value, operates as a revocation of the original instrument, to the extent of the power, in favor of such purchaser or encumbrancer.

43-25-33. Execution of power to revoke or modify instrument affecting title to real property.

Where a person having power of revocation, within the provisions of SDCL 43-25-32, is not entitled to execute it until after the time at which he makes a grant or charge as described in SDCL 43-25-32, the power is deemed to be executed as soon as he is entitled to execute it.

43-25-34. Instrument other than will affecting estate in real property – Effect of fraud.

Every instrument other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or encumbrancers thereon, is void as against every purchaser or encumbrancer, for value, of the same property, or the rents and profits thereof.

Purchaser with notice.

Barnhart v. Anderson, 118 NW 31 (SD 1908). When deed sought to be canceled is shown to have been made to defraud prior or subsequent purchaser, prima facie case is made, and this alone is sufficient to avoid the deed, unless it appears that subsequent purchaser, though paying valuable consideration, had notice of such deed.

In an action by a subsequent purchaser to cancel deed between grantor and prior purchaser because of fraud, it is not necessary to connect prior purchaser with fraud unless subsequent purchaser had notice of the instrument.

43-25-35. Fraud does not avoid instrument affecting estate in real property in favor of subsequent purchaser or encumbrancer with notice – Exception.

No instrument is to be avoided under SDCL 43-25-34 in favor of a subsequent purchaser or encumbrancer having notice thereof at the time of his purchase was made or his lien acquired, unless the person in whose favor the instrument was made was privy to the fraud intended.

43-25-35. Rights of good faith purchaser or encumbrancer protected against fraud.

The rights of a purchaser or encumbrancer in good faith and for value are not to be impaired by any of the provisions of SDCL 43-25-32 to 43-25-35 inclusively.

TITLE STANDARDS

4-10 Deed divests present title of all grantors.

A deed in which all parties to the title join conveys and releases all title presently held by the grantors regardless of the nature or character of the interest or interests held by or vested in such grantors. Accordingly, for example, it is unnecessary to refer to the grantors as "joint tenants" if they happen to be such.

Authority: Former SDTS 2.1.

5-06 Execution by spouse under power of attorney.

A conveyance of homestead property executed by one spouse, individually, and as attorney-in-fact for the other spouse is sufficient if the power of attorney specifically authorizes conveyance of homestead property. A conveyance of homestead property executed by a non-spousal attorney in fact for one or both spouses is sufficient.

5-07 Deed of homestead.

A conveyance or encumbrance of a homestead by its owner, if married and both husband and wife are residents of this state, is valid if both husband and wife concur in and sign or execute such conveyance or encumbrance either by joint instrument or by separate instruments.

Authority: SDCL § 43-31-17.

5-14 Variance in name of grantors.

If the grantees in one instrument of conveyance are "John Smith and Mrs. John Smith," and the grantors in a succeeding instrument in the chain of title are "John Smith and Mary Smith," further evidence e.g. affidavit, recital, etc., should show that Mrs. John Smith is the same person as Mary Smith. The same conclusion should be reached if the grantees were "John Smith and Mary Smith," and the grantors in a succeeding instrument in the chain of title were "John Smith and Mrs. John Smith."

Authority: Former SDTS 10.6.

5-15 Variance between signature or body of deed and acknowledgment.

Where the given name or names or the initials used in a grantor's signature on a deed vary from the name as it appears in the body of the deed, but the name as given in the certificate of acknowledgment agrees with either the signature or the name in the body of the deed, the certificate of acknowledgment should be accepted as providing adequate identification.

Authority: Former SDTS 10.7.

5-16 Deceased persons.

A conveyance to a person who is deceased at the time of the conveyance is invalid.

Note: If a deed was prepared and escrowed or Grantee was alive at the time the transaction was entered, this standard is not applicable.

5-17 Conveyance - Fictitious Persons.

A conveyance is invalid if the named grantee is a mere fictitious person. If an existing person acquires title to real estate under an assumed or fictitious name, there are specific methods for establishing record identity of the person. Authority:

Caveat: Title Examiners do not necessarily agree with the suggestion indicated on page 38 with regard to sole proprietors who are doing business as a different identity. Conveyances by an individual acting under a power of attorney applies only when the written instrument gives specific authorization for conveyances regarding real estate. The examiner should establish that the power is in effect on the date the power is exercised. If no expiration is given on the power of attorney, then the same is terminated by a revocation recorded in the office of the Register of Deeds, or by the death or incapacity of the principal unless the principal has executed a durable or continuing power. A conveyance executed by the attorney-in-fact on behalf of the principal must identify the principal in the body of the instrument and must sign the name of the principal and his or her own name as attorney-in-fact on the conveyance.

5-18 Powers of attorney.

A conveyance or encumbrance executed by an attorney in fact in behalf of the principal must identify the principal in the body of the instrument. The attorney in fact must then sign the name of the principal and his or her own name as attorney in fact, although it is permissible to type the name of the principal.

Authority: SDCL § 59-3-1.

Caveat: Watch for proper acknowledgment for Power of Attorney. SDCL § 18-5-10.

5-19 Durable power of attorney.

A durable power of attorney, which contains the words "this power of attorney is not affected by subsequent disability or incapacity of the principal" or similar words showing the intent of the principal that the authority conferred is exercisable notwithstanding the subsequent disability of the principal and all acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal shall bind the principal and the principal's successors in interest as if the principal were competent and not disabled.

Authority: SDCL §§ 59-7-2.1 and 59-7-2.2.

5-20 Grant of power of attorney.

A power of attorney or certified copy thereof must be recorded to establish the authority of an attorney in fact to act on behalf of the principal. The power of attorney must include in its grant of authority the power to sell or convey if a deed is being executed; or the power to mortgage, pledge or grant as security for loans if a mortgage is being executed. The power to sell or mortgage shall be presumed to include the authority to execute the documents related to consummating the transaction.

Authority: SDCL §§ 59-3-12 and 59-3-5.

5-21 Recording power of attorney.

For any deed or conveyance signed by a person under a Power of Attorney, evidence must be shown of record to be in effect on date of instrument.

Authority: SDCL § 44-8-2.

5-22 Conveyances under authority of power of attorney.

A general authority to convey shall grant to the attorney in fact named in the power of attorney authority to convey any interest the principal has in any property.

5-23 Designation of "trustee".

When the name of a party to an instrument is followed by "trustee" or "as trustee" or "in trust", and neither this instrument nor any other recorded instrument in the chain of title sets forth the powers of such party, or names as the beneficiary, a conveyance by such party can be approved without investigation of the power of such party to convey.

Authority: Former SDTS 2.2; Model Standard 11.1.

Note: SDCL § 55-4-43 provides that a certificate may be recorded to provide conclusive proof of the trustee's authority to act. SDCL § 43- 28-22 provides that conveyances by a fiduciary shall be treated as if they had been made to or by the fiduciary. **Mere Use of Word "Trustee".** The mere employment of the word "trustee" after the name of the grantee is insufficient to create a trust or operate as notice of any kind to a subsequent purchaser. *Rua v. Watson* (1900) 13, SD 453, 83 N.W. 572, followed in *Strain v. Chamberlain Auto & Supply Co.* (1937) 65 SD 427 274 N.W. 661. Designation of grantee as trustee does not necessarily create trust. *Hart v. Seymour*, 147 Ill 598, 35 NE 246; *Hodgson v. Dorsey* (1941) 230 Iowa 730, 298 N.W. 895, 137 ALR 456.

5-24 Trust conveyances - curative statute.

A curative statute validates transfers made to or by a trust prior to July 1, 1991, and construes such transfers to have been made to or by the trustee.

Authority: SDCL § 43-28-22.

5-25 Property in trust.

Real property acquired in the name of a trust should be conveyed in the same manner as title was taken.

5-26 Discrepancy in corporate name.

The alternate use of "Co." for Company, "Inc." for Incorporated, "Corp." for Corporation, "LLC" for Limited Liability Company, "LLP" for Limited Liability Partnership, "PLC" for Professional Limited Liability Company, "Coop." for Cooperative, "Ltd." for Limited, "P.C." for Professional Corporation, and similar common abbreviations, the omission or inclusion of the word "The," whether or not a part of the corporate name, and the alternate use of "and" and "&" may be disregarded as immaterial unless there is evidence of record that the variation has significance. Where a place or location preceded by "of" or "in" is a part of the title of a corporation and a variance relative thereto appears in the record, it is proper to require the execution of another instrument or an appropriate showing of identity.

Authority: Patton on Titles, Secs. 403 (2d ed. 1957). Bayse, *Clearing Land Titles*, Sec. 19 (2d ed. 1070). Former SDTS 10.8.

5-27 Corporate deed.

The corporate seal or corporate acknowledgment of any corporation attached to a deed, mortgage, assignment of mortgage, release of mortgage or other instruments is *prima face* evidence that an officer was duly authorized to execute the instrument in behalf of the corporation and that the person has authority.

Authority: SDCL § 43-25-21.

5-33 Conveyance - limited liability company, authority presumed.

Any instrument duly executed and acknowledged by an authorized person of a limited liability company may be presumed to be within the authority and duly authorized by the limited liability company.

Note: "Manager" includes any one of the following: President, Vice President, Secretary, Treasurer or Manager of a limited liability company.

5-34 Execution - corporate or limited liability company.

A title examiner may presume the power and authority of any officer of a corporation, except a bank, if a corporate acknowledgement or corporate seal is made a part of the document. Upon review of the Articles of Organization, a title examiner may presume the power and authority of any manager of a manager-managed limited liability company or member of a member-managed limited liability company to execute and acknowledge a document affecting property, unless the Articles of Organization limit the authority.

Authority: SDCL §§ 43-25-21 and 47-34A-301.

6-02 Date of acknowledgment.

A title examiner may disregard the absence of the date of acknowledgment or an acknowledgment dated before or after the date of the instrument.

Authority: Patton on Titles, Secs. 197 and 204. Patton on Titles, Secs. 350 and 357 (2d ed. 1957). lA C.J.S., Acknowledgments, Sec. 62. 25 ALR 2d 1141. *Buck v. Gage,* 43 N.W. 110 (Neb. 1889). *Tenney* Co. v. *Thomas,* 237 N.W. 710 (ND 1931). *Hernett v. Meier,* 173 N.W.2d 907 (ND 1970). SDCL § 18-5-1.

6-03 Notary act presumed valid.

A title examiner may presume that a notarial act outside of South Dakota is in accordance with the laws of that jurisdiction.

Authority: SDCL §§ 18-5-15 and 18-5-14.

6-04 Expired notary.

Where the record of an instrument shows a notarial commission to have expired prior to the date of acknowledgment, the acknowledgment is invalid, but the record of the instrument is constructive notice, subject to the provisions of SDCL § 18-5-13.

Authority: lA C.J.S., Acknowledgments, Sec. 34. Patton on Titles, Set 63 (2d ed. 1957). *Sousley v. Citizens' Bank of Nepton,* 181 S.W. 960, (Ky. 1916).

Note: Expiration is optional; SDCL §18-5-13.

6-05 Notary seal.

All certificates of acknowledgment by notaries public on documents filed for record are binding, legal, and enforceable regardless of whether the notary seal is stamped or embossed.

Authority: SDCL § 18-5-13.

7-01 Signatures by mark.

A title examiner should not object to a signature or subscription by "mark" even though there is no witness if the instrument contains a proper certificate of acknowledgment.

7-02 Alternative grantees.

A conveyance to grantees in the alternative renders the conveyance void.

Authority: Patton on Titles, Sec. 183. Patton on Titles, Sec. 336 (2d ed. 1957).

Note: *Armstrong v. Hellwig*, 18 N.W.2d 284 (SD 1945).

7-03 Strangers to title.

An instrument executed by a person who is a stranger to the record chain of title at the time such instrument is recorded does not make the title unmarketable, unless recently recorded, in which event some inquiry may be justified. A title examiner should take notice of the interest of a person joining with the record owner in a contract, mortgage, lease, plat or easement, other than a spouse joining for possible homestead interest. Conveyances by strangers to the chain of title may be disregarded, unless a title examiner has actual notice of knowledge (through sources other than the record) of the interest of the grantor, or unless subsequent to such conveyance there is recorded a deed or other conveyance vesting title in such stranger.

Authority: Former SDTS 2.4; Model Standard 3.3; Bayse, Clearing Land Titles, Sec. 42 (2nd ed. 1970).

Note: **Conveyance by Stranger.** A conveyance or encumbrance attempted by one who has no interest in the property and is a stranger to the chain of title does not constitute a cloud upon such title. *Tripp v. Sieler* (1917) 38 SD 221, 164 N.W. 67. **Equitable Interest.** In view of statute providing for keeping of numerical index in office of register of deeds, purchaser is charged with notice of previously recorded mortgage even though mortgagor had only equitable title and did not appear as transferee in regular chain of title. *Fullerton Lumber Co. v. Tinker* (1908) 22 SD 427, 118 N.W. 800, 18 Ann Cas 11.

7-04 Quit claim - after acquired title.

A quitclaim deed does not pass after-acquired interest in property, unless words expressing such intent are added.

Authority: SDCL 43-25-8 23 Am.Jur.2d, Deeds, Section 14. Patton on Title, Sec. 126, p.427. Patton on Title, Sec. 216 (2d ed. 1957).

7-05 Deeds - after acquired title.

A warranty deed, limited warranty deed or special warranty deed passes after acquired title.

Authority: SDCL § 43-25-17.

7-08 Affidavit of possession as basis for creating marketable title under tax deed.

Where a tax deed is regular on its fact and has been of record for twenty-three years or longer, the title conveyed thereunder can be considered as marketable, if the affidavit of possession as prescribed by SDC Supp. 51.16B07, as amended by Ch. 266 of the Laws of 1957, SDC 1960 Supp. 51.16B07 [§ 43-30-7] is made and filed for record.

Authority: Former SDTS 8.2.

Note: **Nature of Tax Title.** A tax title is not derivative, nor the title of the person who had been assessed and had failed to pay the taxes, but it is a new title in the nature of an independent grant from the sovereignty, extinguishing all former titles and liens not expressly excepted. *Warren v. Blackman* (1933) 62 SD 26, 250 N.W. 681. Where abstract shows filing of affidavit and no claims thereunder, tax title is marketable. Title originating through treasurer's tax deed would not be considered unmerchantable where compliance with Marketable Title Act could cure defect. *Renner v. Crisman* (1964) 80 SD 532, 127 N.W.2d 717.

7-10 Corrective instruments.

A grantor who has conveyed by an effective, unambiguous instrument cannot, by executing another instrument, make a substantial change in the name of the grantee, decrease the size of the premises or the extent of the estate granted, impose a condition or limitation upon the interest granted, or otherwise derogate from the first grant, even though the latter instrument purports to correct or modify the former. However, marketability dependent upon the effect of the first instrument is not impaired by the second instrument.

Authority: R. & C. Patton, Titles '82 (2d ed. 1957); Decennial Digests, Deeds, Key No. 43; Kirkpatrick v. Ault, 177 Kan. 552, 280 P.2d 637 (1955); Watlers v. Mithcell, 6 Cap.App. 410, 92 P. 315 (1907); Lytle v. Hulen, 128 Or. 483, 275 P. 45 (1929).

7-11 Instruments which are altered and rerecorded.

The act of re-recording an instrument, after it has been materially altered, does not of itself destroy the rights of the parties to the original unaltered instrument. To give effect o a material alteration of a previously recorded document affecting title to real property, the instrument must be re-executed, re-acknowledged, re-delivered and re-recorded. However, a grantor cannot unilaterally derogate from a previous grant; see Standard 3.4. A material alteration to an instrument is defined as an alteration which changes the legal effect of the instrument or the rights and liabilities of the parties to the original instrument.

Authority: 15 O.S. § 239; Briggs v. Sarkey, 418 P.2d 620 (Okla. 1966); Smith v. Fox, 289 P.2d 126 (Okla. 1954); Boys v. Long, 268 P.2d 890 (Okla. 1954); DeWeese v. Baker-Kemp Land Trust Corporation, *et al.,* 187 Okla. 1341, 102 P.2d 884 (1940); Sandlin v. Henry, 180 Okla. 334, 69 P.2d 332 (1937); Criner v. Davenport-Bethel Co., 144 Okla. 74, 289 P.742 (1930); Eneff v. Scott, 120 Okla. 33, 250 P. 86 ((1926) Sipes v. Perdomo, 118 Okla. 181, 127 P. 689 (1925); Orr v. Murray, 95 Okla. 206, 219 P. 333 (1923); Francen *et ux.* v. Okla. Star Oil Co., 80 Okla 103, 194 P. 193 (1921); Patton on Titles, § 65 n.36.

Note: What constitutes a material alteration varies depending on the court's analysis of the facts of each case. As to changing a name of a party to an instrument, see Sipes v. Perdomo, Sandlin v. Henry and Criner v. Davenport-Bethel Co., supra, and Amerian National Bank of Wetumka v. Hightower, 87 P.2d 311, 315 (Okla. 1939).

14-09 Deeds - unsatisfied mortgage.

A deed from the record holder of an unsatisfied mortgage or other encumbrance, who is also the record title holder, which does not except the encumbrance or state that the deed is given subject to the encumbrance, is sufficient as a discharge of the encumbrance.

Authority: Patton on Titles, Sec. 303; Patton on Titles, Sec. 564 (2d ed. 1957). *Commercial Merchants Natl. Bank & Trust Co. of Peoria v. Le Tourneau*, 137 F.2d 87 (7th Cir. 1943).

15-02 Executor's deed.

For conveyances out of an estate prior to July 1, 1995, a certified copy of an order confirming sale made by a South Dakota circuit court and an executor's or administrator's deed is necessary to complete the chain of title, except in certain circumstances of an independent administration.

Authority: SDCL § 30-18A-4 & 5; SDCL § 30-22-63 & 64 [Repealed by S.L. 1995, Ch. 167, Section 82]. Replaced by procedures as provided in Title SDCL 29A (Uniform Probate Code).

Note: SDCL ch. 29A-8 provides for a July 1, 1995 effective date for the Uniform Probate Code. In accordance with SDCL § 29A-8-101 this standard can apply to estates commenced prior to July 1, 1995 even though the conveyance from the estate is made after July 1, 1995.

15-03 Conveyances made under probate.

For conveyances under the Uniform Probate Code, SDCL ch. 29A, a duly recorded personal representative's deed or a duly recorded order of complete settlement distributing specifically described real property to the heirs or devisees in specified shares or proportions is required to complete the chain of title.

Authority: Former SDTS 2.5; SDCL §§ 29A-3-907, 29A-3-715 (b) and 29A-3- 1002(e).

15-05 Authority of personal representative.

Upon the death of a person, the real and personal property devolves to the heirs or devisees, subject to claims and the administration of the estate, which includes the authority of the personal representative to convey.

Authority: SDCL § 29A-3-101.

15-06 Deed of distribution.

A deed of distribution is evidence of the distributee's title. The distributee's receipt of the deed is conclusive evidence that the distributee is the one entitled to the property.

Authority: SDCL §§ 29A-3-907 and 29A-3-908.

15-14 Guardian's deeds.

For conveyances from a guardian prior to July 1, 1993, a certified copy of an order of a court confirming the sale, together with a guardian's deed is necessary to complete the chain of title.
Authority: SDCL § 30-29-27. (Former law.)

15-15 Conservator's deeds.

For conveyances from a conservator on or after July 1, 1993, a conservator's deed and a certified copy of the letters of conservatorship from a court of competent jurisdiction are necessary to complete the chain of title.

Authority: SDCL §§ 29A-5-103 and 29A-5-418.

Note: A certified copy of unrestricted letters of the conservator which establishes that the letters were in effect on the date of the title transaction, is conclusive evidence of the conservator's authority. Guardianship proceedings in existence prior to July 1, 1993, continue in effect after that date and the guardian of the estate appointed prior to July 1, 1993, shall have the same powers as previously granted. SDCL § 29A-5-103. A conservator must file and record the letters within 90 days following the appointment. SDCL § 29A-5 418. Normal power includes power of sale; but note, if asset does not have readily ascertainable fair market value, then comply with statute. SDCL § 29A-5-412.

15-19 Omitted real estate or faulty description of closed estate.

When an estate has been as administered in probate court and a final decree of distribution recorded in the land records, no reopening of the estate shall be required to convey an interest of the decedent merely because: (1) all of the real estate of the decedent or interest therein was not included in the inventory or in the decree of distribution, or (2) the description of such estate or interest to be mis-described in the probate record. A deed by heirs or devisees, whether in or quitclaim, shall be effective to pass title to real estate if the existing probate record enables a clear and unambiguous determination that the grantors would be the persons entitled to decree of such estate or interest if the estate were reopened to correct the error or include the omitted property.

16-01 Omission and inconsistency of dates.

The fact that an instrument affecting title may not be dated, or that inconsistency exists between its date, the date of attestation, the date of acknowledgment or the date of recordation, does not impair marketability, unless the inconsistency is of such peculiar significance, when considered with other circumstances of record, as to impel a reasonable suspicion on the part of the examiner that the title may be defective.

Authority: Former SDTS 11.1; Model Standard 6.2.

16-02 Effect of curative acts.

An act, curative of matters of execution, acknowledgment and recording, or procedural omission, irregularities or defects, is presumed to be valid legislation, effectively

eliminating objections based upon the imperfections of title which fall within its scope as to subject matter and date, thus avoiding necessity of action to quiet title. A curative statute purporting to legalize alleged defects in probate proceedings is inoperative as against a claim based upon legal action or proceeding which the record shows was pending at the time the curative statute went into effect, whether or not the curative statute so states.

Authority: Former SDTS 4.1.

19-01 Metes and bounds.

When any owner of a government subdivision or a platted tract or lot divides that land into parcels for the purpose of transfer that cannot be described except by metes and bounds, the parcels of land so divided must be platted before any instrument of transfer can be recorded. Real property descriptions using metes and bounds may be recorded only if a previous conveyance by the same metes and bounds has been made and recorded.

Authority: SDCL §§ 43-21-4 and 43-21-4.1.

26-01 Tax title.

Neither a tax deed issued pursuant to any of the provisions of SDCL 10-25-12, nor any combination of such deeds, terminates the rights of the owner who owned it prior to its sale for taxes, unless there is:

(a) A judgment in a quiet title action;
(b) A marketable Record Title Affidavit pursuant to SDCL 43-30-7 (using as a "root of title" the tax deed from the county);
(c) A deed conveying the prior owner's interest.

Authority: SDCL §§ 21-42, 10-25-12 and 43-30-7.

Note: Under SDCL § 10-25-13, the issuance of a tax deed to the county constitutes *prima facia* evidence of the regularity of the proceedings leading up to the issuance of the deed, including the expiration of the period for redemption. Under SDCL § 10-25-18, the expiration of the redemption period cuts off all of the prior owner's rights in the property and results in a waiver of all errors in the tax sales proceedings except jurisdictional defects. There is no way of knowing what the courts will consider to be a jurisdictional defect, but historically they have been exceedingly stringent in requiring exact and precise compliance with all of the statutory steps in the tax sales proceedings. Moreover, SDCL § 21-42-1 specifically contemplates and authorizes a quiet title action by a prior owner against the tax deed grantee of the county, which seemingly indicates a legislative lack of confidence in the regularity of tax sales proceedings. For those and other reasons, tax titles are considered inherently suspect in the absence of some curative action or occurrence - such as appropriate use of the provision of the Marketable Record Title Act - to extinguish the title of the party or persons who owned the real property prior to its being lost for unpaid taxes. Beyond all of this, however, (except in the rather rare case when a third party and not the county is the purchaser at the original tax sale), the prior owner and other persons have various statutory rights of re-purchase or pre-emptive purchase under SDCL § 21-42-10 as long as the property remains in the hands of the county. In theory the sale of the property by the county to a third party should terminate these statutory rights, but again historically the courts have been

lenient in allowing the holders of such rights to attack the title of purchasers from the county.

26-02 Effect of tax deed.

A valid tax deed clothes the grantee with a new and complete title under an independent grant from the sovereign authority of the state, extinguishing all prior titles.

Authority: SDCL 10-25.

Note: The tax deed does not convey marketable title.

ADDITIONAL SOUTH DAKOTA CASELAW

1) Deed language and construction.

In the Matter of the Estate of Ralph F. Rosenbaum, 624 NW2d 821 (SD 2001).

In this appeal, The SD Supreme Court considered the effect of an agreement to convey property and then reconvey it following a quiet title action on the issue of ownership in riverside land accreted to that property. The circuit court ruled that Glen and Delories were entitled to a one-half interest in the accretion property (Rosenbaum Tract Two), reasoning that a one-half interest in that property was implicitly included in the deed reconveying Lots 2A and 3A to Glen. This appeal followed.

Standard of Review: A deed to property is interpreted as a contract and contract interpretation is a question of law. See SDCL 43-4-13. Whether a contract is ambiguous is also a question of law subject to de novo review.

Held: *Reversed. Ralph's action in seeking and obtaining separate title to the accretion property evinces a clear intent to severe it from Lots 2A and 3A and the other contiguous lots that Ralph held alone; consequently, when the reconveyance occurred the accreted land was not included.* The district court recognized the discrete character of the accretion ground by using a separate legal description. The ground is not described as property abutting other parcels owned by Ralph, but is instead described as Lots One (1) and Two (2) of Rosenbaum tract Two (2). It was only after this order that the deed reconveying Lots 2A and 3A took effect. A deed in escrow is not delivered until the performance of all conditions. *See* SDCL 43-4-11. It is undisputed that the escrow agent was not to deliver the deed to Glen until title was quieted in Ralph's name. Once that condition had occurred, the accretion property had a wholly separate legal description and was effectively severed from Lots 2Aand 3A and the other continuous lots. Consequently, we conclude that the Circuit Court erred in ruling that the deed from Ralph to Glen contained a one-half interest in the accretion property.

Recognizing: When land forms on the edge of a river, either by accumulation of material or recession of water, the land so formed belongs to the owner of the banks. *See* SDCL 43-17-5. Since an accretion becomes part of the upland to which it attaches, the law presumes that the conveyance of uplands includes accretions. *See* North Shore Inc. v. Wakefiled, 530 NW2d 297, 203 (ND 1995). This presumption comports with SDCL 43-25-15, which provides that a conveyance of land is a grant in fee simple with all accompanying rights. A presumption,

however, can be overcome. The presumption that accretions are included in a conveyance of uplands is subject to "an important qualification." The presumption is rebutted when there is a severance of the accretion ground from the original land. Once severance occurs, "transactions involving the original land do not affect accretions." *See* Bryant v. Chicago Mill and Lumber Co., 216 F2d 727, 731 (8th Cir. 1954). Severance is determined by the grantor's intent and occurs, for example, when the grantor conveys accretion ground separate from the upland parcel. Where the record title to property shows a prior judgment separating the uplands from the accretions, the presumption is successfully rebutted. North Shore Inc., 530 NW2d at 302.

2) Contract for deed language and construction.

Hofeldt v. Mehling, 658 NW2d 783 (SD 2003).

Vendor brought action against land purchaser for unjust enrichment based on purchaser's use of land before sale closed. The Circuit Court entered judgment for purchaser. Vendor appealed.

Held: *Affirmed. The trial court did not violate the parole evidence rule in the face of an unambiguous contract nor err in holding that Mehling was not contractually obligated to pay rent or reimburse subsidies.* SDCL 53-8-5 provides that, "the execution of a contract in writing, whether the law requires it to be in writing or not, supercedes all the oral negotiations or stipulations concerning its matter which *preceded or accompanied* the execution of the agreement." The Court said, "By its express statutory language, the rule does not apply to conduct and statements taking place *after* a contract has been executed. Thus, evidence of negotiations occurring after a written agreement will not be excluded by the parole evidence rule."

Held: *Affirmed. "In view of the law and the circumstances of this case, we conclude that the trial court, in weighing the equities, did not abuse its discretion in ruling that Hofeldt was not entitled to restitution for unjust enrichment."* "Unjust enrichment occurs when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying." Parker v. Western Dakota Insurors, Inc., 605 NW2d 181, 187 (SD 2000). In weighing the equities of the matter, the trail court explained, "Mehling only received what he would have received had Hofeldt acted diligently in the beginning. The only arguable unjust enrichment is the benefit of having Hofeldt pay the taxes over the years. In this instance, Mehling has tendered those taxes."